

Jerry Lee Sargent appeals the post-conviction court's denial of his petition for post-conviction relief. Sargent raises three issues, which we consolidate and restate as:

- I. Whether he was denied the effective assistance of trial and appellate counsel; and
- II. Whether he received a full, fair, and unbiased adjudication of his post-conviction claims.

We affirm.

The relevant facts, as stated in Sargent's direct appeal, follow:

Sargent robbed a store in Jeffersonville, Indiana, at gunpoint. Upon leaving he forced a female who worked at the store to accompany him. Sargent held a gun to her back and threatened to kill her. After leaving the scene of the armed robbery, Sargent beat and raped the female several times over an eight and one-half hour period.

Sargent v. State, No. 10A01-8903-CR-95, slip op. at 2 (Ind. Ct. App. October 20, 1989).

On December 1, 1987, Sargent was charged with armed robbery¹ and armed criminal confinement² as class B felonies and possession of marijuana as a class D felony. The State later moved to dismiss the possession of marijuana charge and filed an habitual offender enhancement.³

On September 30, 1988, after a three day jury trial, Sargent was convicted of armed robbery and armed criminal confinement as class B felonies. During the habitual offender phase of the trial, the jury found that Sargent was an habitual offender based on the following prior, unrelated felony convictions: (1) arson and breaking and entering on

¹ Ind. Code § 35-42-5-1.

² Ind. Code § 35-42-3-3.

³ Ind. Code § 35-50-2-8.

June 19, 1973; (2) escape on June 3, 1974; (3) receiving stolen property over \$100 and Wanton Endangerment I on August 23, 1977; and (4) receiving stolen property over \$100 on June 9, 1982. The trial court sentenced Sargent to ten years enhanced by ten years for aggravating circumstances for the armed robbery conviction, and enhanced that sentence by thirty years for Sargent's habitual offender status. The trial court further sentenced Sargent to ten years enhanced by ten years for aggravating circumstances for the criminal confinement conviction and ordered that the sentences be served consecutively. Thus, the trial court sentenced Sargent to a total sentence of seventy years in the Indiana Department of Correction. Sargent filed a motion to correct error, which was denied.

On appeal, Sargent argued that the trial court erred by: (1) overruling his "Motion to Suppress In-Court Identifications by the State's witnesses;" (2) overruling his motion to suppress the search warrant resulting in his arrest; (3) overruling his motion to suppress a handgun; (4) overruling his objections to certain testimony as hearsay; (5) denying his motion in limine "with regard to evidence of an attempted escape;" and (6) denying his motion for a continuance. Id. We affirmed his convictions. Id. at 5.

Sargent filed a verified petition for post-conviction relief on November 3, 1994, and an amended petition on December 7, 2005, raising, among other issues, the issues he now presents on appeal. After a hearing on September 18, 2006, the post-conviction court denied Sargent's petition, adopting the State's proposed findings of fact and conclusions thereon.

Before discussing Sargent's allegations of error, we note the general standard under which we review a post-conviction court's denial of a petition for post-conviction

relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004); Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Fisher, 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Further, the post-conviction court in this case entered findings of fact and conclusions thereon in accordance with Indiana Post-Conviction Rule 1(6). Id. “A post-conviction court’s findings and judgment will be reversed only upon a showing of clear error – that which leaves us with a definite and firm conviction that a mistake has been made.” Id. In this review, we accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. Id. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. Id.

I.

The first issue is whether Sargent was denied the effective assistance of trial and appellate counsel. We apply the same standard of review to claims of ineffective assistance of appellate counsel as we apply to claims of ineffective assistance of trial counsel. Williams v. State, 724 N.E.2d 1070, 1078 (Ind. 2000), reh’g denied, cert. denied, 531 U.S. 1128, 121 S. Ct. 886 (2001). To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his counsel’s performance was deficient and that the petitioner was prejudiced by the deficient performance. Ben-

Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984), reh’g denied), reh’g denied, cert. denied, 534 U.S. 830, 122 S. Ct. 73 (2001). A counsel’s performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. French v. State, 778 N.E.2d 816, 824 (Ind. 2002). To meet the appropriate test for prejudice, the petitioner must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. Id. Failure to satisfy either prong will cause the claim to fail. Id. Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. Id.

A. Trial Counsel

1. Double Jeopardy

Sargent argues that his trial counsel was ineffective for failing to object to “the imposition of convictions and sentences that violate the prohibition against double jeopardy.” Appellant’s Brief at 16. He notes that the offenses of robbery and criminal confinement are enhanced to B felonies if committed with a deadly weapon. See Ind. Code §§ 35-42-3-3, 35-42-5-1. He asserts that, because both offenses in his case were enhanced to B felonies based upon the same deadly weapon, namely, a handgun, his convictions violate the prohibition against double jeopardy.

Sargent cites Lyles v. State, 576 N.E.2d 1344 (Ind. App. 1991), in support of his argument. In Lyles, the defendant was convicted, in part, of battery and intimidation as class C felonies after he used a box cutter to cut the victim’s face and chest while yelling obscenities and saying that he would cut her throat. Id. at 1347. On appeal, we found sua

sponte that the defendant's convictions for battery and intimidation as class C felonies violated the prohibition against double jeopardy. Id. at 1352. We reasoned that:

Battery was charged as being committed "by means of a certain deadly weapon, to-wit: a metal instrument having a sharp triangular blade" (R. 20). Intimidation was charged as being "committed by use of a deadly weapon, to-wit a metal instrument having a sharp triangular blade" (R. 20). The phrase "committed by means of a deadly weapon" has the same meaning as the phrase "committed by use of a deadly weapon". Under [Bevill v. State, 472 N.E.2d 1247 (Ind. 1985), reh'g denied], the same use cannot be utilized to enhance both charges. Accordingly, the intimidation conviction as a class C felony should be entered as a conviction for a class D felony.

Id.

Lyles is distinguishable from the present case, however, because Sargent's enhanced convictions for robbery and criminal confinement with a deadly weapon are not predicated upon the same use of the handgun. The record reveals that Sargent robbed his victim at gunpoint and then, as a separate and distinct act, forced her to leave the store with him by holding a gun to her back and threatening to kill her. He further held her at gunpoint several times as he beat and raped her over the next eight and one-half hours. Accordingly, we cannot say that Sargent's trial counsel was ineffective for failing to object to the alleged double jeopardy violation.

2. Vouching Testimony

Sargent's next contention is that his trial counsel was ineffective for failing to object, on the final day of the trial, to testimony from a detective that allegedly bolstered the testimony of the victim. Sargent draws our attention to the following exchange from the State's cross-examination of the detective:

Q: Based upon your training and experience and education and expertise have you developed the ability to assess whether a so-called victim is being truthful?

A: Certainly.

Q: In this particular case do you believe [the victim] was truthful?

A: Absolutely.

Transcript at 1096.

Sargent maintains that this testimony violated Indiana Evidence Rule 704(b), which prohibits witnesses from testifying to opinions concerning, among other things, “whether a witness has testified truthfully.” We agree with Sargent that it was improper for the detective to offer his opinion as to the victim’s credibility. See, e.g., Bufkin v. State, 700 N.E.2d 1147, 1150 (Ind. 1998) (holding that it was improper for a police captain to offer his opinion as to another witness’s credibility). However, we do not agree that trial counsel’s failure to object to this testimony denied Sargent the effective assistance of counsel. Isolated poor strategy, bad tactics, a mistake, carelessness or inexperience do not necessarily amount to ineffective assistance of counsel unless, taken as a whole, the defense was inadequate. Smith v. State, 689 N.E.2d 1238, 1244 (Ind. 1997). Trial counsel’s failure to object to testimony near the end of a three day trial was, at most, an isolated error and does not amount to ineffective assistance. See, e.g., Bufkin, 700 N.E.2d at 1151 (holding that trial counsel’s failure to object to testimony violating Indiana Evidence Rule 704(b) was, at most, an isolated error that did not amount to ineffective assistance).

3. Admission of Fingerprints

Sargent next claims that his trial counsel was ineffective for failing to object to the admission of his fingerprints into evidence during the habitual offender phase of the trial. He contends that he was forcibly seized from Kentucky to be tried in Indiana and that any evidence obtained from this “illegal seizure,” in particular the fingerprints, would have been inadmissible. Appellant’s Brief at 23. However, Sargent fails to cite to the record or to case law in support of his argument. Consequently, Sargent has waived this argument. See, e.g., Johnson v. State, 832 N.E.2d 985, 1005 (Ind. Ct. App. 2005) (holding that appellant’s failure to support an argument with citation to the record or to relevant case law constituted a waiver of the argument), reh’g denied, trans. denied.

4. Habitual Offender Enhancement

Sargent also argues that his trial counsel was ineffective for “failing to defend against the habitual offender allegation.” Appellant’s Brief at 23. He claims that, of the four felony convictions found by the jury, one “was vacated and the other prior felony conviction was remanded and not in proper sequence under the habitual statute for purpose of a finding.” Id. at 24. First, we note that Sargent does not identify the prior, unrelated felonies that he claims were invalid. Moreover, even assuming that his assertions are true, the jury found, and Sargent does not dispute, that he had been convicted of four prior, unrelated felonies. Thus, even assuming that two were invalid, the two remaining prior, unrelated felony convictions were sufficient to support an

habitual offender finding.⁴ See Williams v. State, 525 N.E.2d 1238, 1241 (Ind. 1988) (“In an habitual offender proceeding, the State must prove that the defendant was convicted and sentenced for two prior unrelated felonies.”). Accordingly, we cannot say that Sargent’s trial counsel was ineffective.

B. Appellate Counsel

Sargent also argues that he was denied the effective assistance of appellate counsel. As previously noted, we apply the same standard of review to claims of ineffective assistance of appellate counsel as we apply to claims of ineffective assistance of trial counsel. Williams, 724 N.E.2d at 1078. A petitioner must demonstrate both that his counsel’s performance was deficient and that the petitioner was prejudiced by the deficient performance. Ben-Yisrayl, 729 N.E.2d at 106. Indiana courts have recognized three categories of alleged appellate counsel ineffectiveness: (1) denying access to an appeal, (2) failing to raise issues, and (3) failing to present issues competently. Bieghler v. State, 690 N.E.2d 188, 193-195 (Ind. 1997), reh’g denied, cert. denied, 525 U.S. 1021, 119 S. Ct. 550 (1998). Under the third category, when appellate counsel’s presentation of a claim on appeal is so deficient the reviewing court deems it waived, the appellant is in little better position than if counsel had failed to raise the issue in the first place. Id. at

⁴ Sargent cites Miller v. State, 275 Ind. 454, 460, 417 N.E.2d 339, 343 (1981), for the proposition that, where a defendant has been found to be an habitual offender by a general verdict form, and two of the four prior, unrelated convictions used to support the finding are invalid, the finding cannot stand because “it cannot be discerned which of the four alleged prior convictions provided the factual basis for the jury’s determination.” In the present case, however, the jury did not use a general verdict form, but rather, a special verdict form indicating that the jury had found that Sargent had been convicted of all four prior, unrelated offenses alleged by the State. Therefore, the reasoning in Miller does not apply to the present case.

195. Nevertheless, counsel's representation in its entirety is the touchstone of determining whether counsel's performance fell below an objective standard of reasonableness. Id. Even when counsel's performance is found constitutionally deficient under this analysis, appellant must still show a reasonable probability that, because of counsel's deficiencies, the convictions are fundamentally unfair or unreliable. Id.

1. Double Jeopardy

Sargent argues that appellate counsel was ineffective because he failed to raise the issue of his alleged double jeopardy violation as discussed in Part A, supra. Because Sargent has failed to show that his convictions for armed robbery and armed criminal confinement violate the prohibition against double jeopardy, we cannot say that his appellate counsel was ineffective for failing to raise the issue on appeal. See Part A, supra.

2. Search Warrant

Sargent also complains that his appellate counsel failed sufficiently to argue that the search warrant leading to his arrest "did not describe with particularity the evidence to be searched for." Appellant's Brief at 26. On his direct appeal, Sargent argued that "the search warrant was overly broad in its description of him and did not describe with particularity the evidence to be searched for." Sargent v. State, No. 10A01-8903-CR-95, slip op. at 3 (Ind. Ct. App. October 20, 1989). We held that Sargent had waived review of this issue because he had failed to make a clear showing of how "the issue[] and contentions in support thereof relate to the particular facts of the case under review." Id. at 4. We reasoned:

Sargent was described in the search warrant as a white male, 6'3", reddish/blond curly hair, bearded and of slender build. The items to be sought were those that pertained to the rape and abduction of the victim.

Once beyond stating the general proposition that search warrants must describe with particularity the evidence to be searched for, citing Guajardo v. State (1986), Ind., 496 N.E.2d 1300, Sargent's argument ends. Neither is it argued that the physical description of Sargent was either erroneous or a source of reversible error.

Id. at 3.

Sargent claims that his appellate counsel should have cited more cases and explained his reasoning further "to provide a complete appeal of the issue." Appellant's Brief at 27. However, Sargent has failed to cite to the record or develop an argument as to how the search warrant leading to his arrest was overly broad. Thus, Sargent has failed to show a reasonable probability that, because of counsel's deficiencies, his convictions are fundamentally unfair or unreliable. Accordingly, we cannot say that his appellate counsel was ineffective.

3. Attempted Escape

Sargent also argues that his appellate counsel "rendered deficient performance when structuring a motion-in-limine ruling, regarding evidence of [Sargent's] attempted escape, as an issue on appeal." Id. at 28. Sargent's appellate counsel argued on his direct appeal that "the trial court committed an uncorrected error of law by denying [Sargent's] motion-in-limine with regard to evidence of an attempted escape." Sargent, slip op. at 2. In addressing this claim, we held that "[a] ruling on a motion in limine, standing alone, does not present an appropriate issue for appellate review." Id. at 5. Sargent now complains that his appellate counsel "should have raised the issue of the admissibility of

the attempted escape instead of raising the issue of the trial court's motion in limine." Appellant's Brief at 28. However, Sargent has failed to show a reasonable probability that, because of counsel's deficiencies, his convictions are fundamentally unfair or unreliable. Accordingly, we cannot say that his appellate counsel was ineffective.

II.

The next issue is whether Sargent received a full, fair, and unbiased adjudication of his post-conviction claims. Specifically, Sargent contends that "she [sic] was denied a full, fair and unbiased adjudication of her [sic] post-conviction claims when the post-conviction court essentially adopted verbatim the proposed findings of fact and conclusions of law submitted by the State." Appellant's Brief at 14.

We note that, in Prowell v. State, 741 N.E.2d 704 (Ind. 2001), the Indiana Supreme Court acknowledged that a trial court's verbatim adoption of a party's proposed findings may have important practical advantages and expressly declined to prohibit the practice. The Court reasoned:

It is not uncommon for a trial court to enter findings that are verbatim reproductions of submissions by the prevailing party. The trial courts of this state are faced with an enormous volume of cases and few have the law clerks and other resources that would be available in a more perfect world to help craft more elegant trial court findings and legal reasoning. We recognize that the need to keep the docket moving is properly a high priority of our trial bench. For this reason, we do not prohibit the practice of adopting a party's proposed findings. But when this occurs, there is an inevitable erosion of the confidence of an appellate court that the findings reflect the considered judgment of the trial court. This is particularly true when the issues in the case turn less on the credibility of witnesses than on the inferences to be drawn from the facts and the legal effect of essentially unchallenged testimony. For the reasons explained below, most of the statements in the findings of fact and conclusions of law are correct if viewed in isolation, but many are presented out of context and,

as a result, are significantly misleading. We find some of the critical findings of the postconviction court to be clearly erroneous as that term is used in Trial Rule 52(A).

Id. at 708-709.

Accordingly, under Prowell, the fact that the post-conviction court adopted the State's proposed findings does not alone demonstrate that Sargent was denied a fair adjudication of his post-conviction claims. Sargent has not shown, much less alleged, that any of the post-conviction court's critical findings are clearly erroneous. See id. at 709. Because Sargent's argument that he did not receive a fair adjudication of his post-conviction claims is premised solely on the fact that the post-conviction court adopted the State's proposed findings verbatim, his argument fails. See, e.g., Stevens v. State, 770 N.E.2d 739, 762 (Ind. 2002) ("While near verbatim reproductions may appropriately justify cautious appellate scrutiny, we decline to hold that the post-conviction court's utilization of the State's proposed findings in the present case constituted a failure to provide the defendant with a full, fair and unbiased adjudication of his post-conviction claims.").

For the foregoing reasons, we affirm the post-conviction court's denial of Sargent's petition for post-conviction relief.

Affirmed.

DARDEN, J. and NAJAM, J. concur